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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

16 CR 385 (DLC)

5 DAVID W. KENT,

6 Defendant.

7 -----x

8 New York, N.Y.

9 June 14, 2016

2:00 p.m.

10 Before:

11 HON. DENISE COTE,

12 District Judge

13 APPEARANCES

14 PREET BHARARA

15 United States Attorney for the

16 Southern District of New York

17 ANDREW KW CHAN

Assistant United States Attorney

18 COGDELL LAW FIRM, PLLC

Attorneys for Defendant

19 BY: DAN COGDELL

20 SPEARS & IMES, LLP

Attorneys for Defendant

21 BY: JOANNA C. HENDON

22 ALSO PRESENT:

23 EVELYNINA ASLANYAN, FBI Agent

ANYA HAVRILIAK, Intern

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(Case called)

MR. CHAN: Good afternoon, your Honor. Andrew Chan here on behalf of the United States. I am joined at counsel table this afternoon by Special Agent Evelynina Aslanyan with the Federal Bureau of Investigation, and Ms. Anya Havriliak who is an intern with the U.S. Attorney's office this summer.

MR. COGDELL: Good morning, your Honor, appearing *pro hac vice* for Mr. Kent, who is present. With me is Joanna Hendon.

MS. HENDON: Good afternoon, your Honor.

THE COURT: Good afternoon. Welcome, everyone.

MR. COGDELL: Thank you.

THE COURT: I'll take a report from you, Mr. Chan.

MR. CHAN: Yes, your Honor.

The defendant was initially arrested on a complaint on March 30 of this year in Houston and was presented on that date. He was then presented in the Southern District of New York before Judge Moses on April 5 of this year. The defendant then waived indictment and was arraigned on an information on June 3 of 2016. We are now here today for the initial pretrial conference.

THE COURT: So the arraignment occurred on June 3?

MR. CHAN: Yes. That's correct, your Honor.

THE COURT: Was there an exclusion of time?

MR. CHAN: Yes, there was, your Honor, until today.

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1 THE COURT: By the magistrate judge?

2 MR. CHAN: Yes, that's correct.

3 THE COURT: As of now, no days have elapsed under the
4 speedy trial clock?

5 MR. CHAN: Yes. That's correct, your Honor.

6 THE COURT: What's the status of discovery?

7 MR. CHAN: Your Honor, because plea negotiations have
8 been extremely productive and because of the voluminous nature
9 of the discovery, the defendant has only asked for certain
10 narrow categories of discovery that will help to further along
11 the plea negotiations to determine whether or not an early
12 resolution in this case is possible.

13 To that end, the defendant has asked for the following
14 narrow categories of discovery: A recorded phone conversation
15 between the defendant and the owner of the victim website, a
16 video recording of a meeting between the defendant and the
17 owner of the victim website, and a recording of the defendant's
18 interview on the date of his arrest. The defendant has also
19 asked for copies of certain categories of e-mail
20 communications, as well as a list of the e-mail addresses and
21 resident IDs that were allegedly accessed without authorization
22 from the victim website. Now, as to that last category, I am
23 not sure if the court was aware that there was an agreed upon
24 protective order --

25 THE COURT: Yes.

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1 MR. CHAN: -- as posed to the court late yesterday
2 evening.

3 THE COURT: Yes, and he reviewed it. I understand it
4 has been approved by defense counsel and I will sign it now.

5 MR. CHAN: Thank you, Judge.

6 In that case, the government will be able to provide
7 that particular spreadsheet to the defendant within the next
8 couple days, probably most certainly by the end of the week.

9 THE COURT: Production of the limited discovery, you
10 have outlined, will be by June 17. When will full discovery be
11 made, if requested?

12 MR. CHAN: Your Honor, the government and the defense
13 have agreed upon a discovery deadline for both parties of
14 August the 15th due to the voluminous nature of the remainder
15 of the discovery.

16 Would the court be interested in hearing about the
17 trial-related discovery?

18 THE COURT: Trial related -- I'm sorry?

19 MR. CHAN: The remainder of the discovery that is yet
20 to be produced.

21 THE COURT: You mean the Rule 16 discovery?

22 MR. CHAN: Yes.

23 THE COURT: No. I don't need you to outline that for
24 me just to set a schedule.

25 That will be produced, if necessary, by August 15?

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1 MR. CHAN: Yes. That's correct, your Honor.

2 THE COURT: If this case went to trial, how long would
3 it take to try?

4 MR. CHAN: Your Honor, we would estimate that the
5 trial would last approximately a week. It may spill over into
6 a second week, almost certainly less than two weeks.

7 THE COURT: What would be the principal sources of the
8 government's proof at trial?

9 MR. CHAN: Your Honor, the government's proof at trial
10 would include e-mails from the defendant and other
11 coconspirators that the defendant participated in the crimes
12 with. It would also include records from dozens of Internet
13 service providers, including an Internet service provider known
14 as a virtual private network that allows for users to conceal
15 their identities on the Internet. The government's proof would
16 also likely include bank records and phone records and records
17 from other Internet companies. The government's proof would
18 also include data from the victim website, as well as the
19 defendant's own website, and would likely include testimony
20 from witnesses that have analyzed much of the electronic
21 discovery. The government's evidence would also include
22 physical and electronic evidence that was seized pursuant to
23 search warrants that were executed on the date of the
24 defendant's arrest. It would also include likely testimony
25 from victims who had their personal identifying information

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1 taken, as well as witnesses from the victim website.

2 THE COURT: What about a post-arrest statement?

3 MR. CHAN: Yes, it would also include the post-arrest
4 statement.

5 THE COURT: Have counsel discussed a schedule for
6 trial?

7 MR. CHAN: Yes, your Honor. The parties had
8 previously discussed a trial date in mid January. As I
9 understand, the court might not have availability then for
10 trial.

11 THE COURT: Right. I can give you a trial in
12 December, early December, or in February. Which do you prefer?

13 Why don't you consult with each other.

14 MR. COGDELL: February, your Honor.

15 MR. CHAN: Your Honor, I think the parties would
16 prefer February.

17 THE COURT: We will schedule trial on February 20.
18 I'll exclude time until January 16.

19 Any objection to an exclusion of time from today until
20 January 16?

21 MR. COGDELL: No, ma'am.

22 MR. CHAN: No, your Honor.

23 THE COURT: I am going to exclude time under the
24 Speedy Trial Act, Title 18, United States Code,
25 Section 3161(h)(7)(A) finding it is in the interest of justice

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1 and outweighs the best interest of the defendant and the public
2 to a speedy trial and permit discovery to be produced and
3 evaluated. If the defendant wishes to enter a plea of guilty,
4 it will permit the parties to have time to discuss that
5 disposition. If the defendant prefers to go to trial, it will
6 permit motions to be made. It appears there may be motions
7 that are appropriate here. It will give everyone an
8 opportunity to prepare for trial.

9 Let's talk about a motion schedule. Full discovery
10 would be made in mid August, so let's have motions due
11 October 21 and any response due October 28. That will give us
12 time for any suppression hearing that might be necessary to
13 occur in November, early December.

14 Mr. Chan, is there anything else? What's the status
15 of bail?

16 MR. COGDELL: He is on bail, your Honor. It was
17 \$1 million secured by 50,000. He is on bail.

18 THE COURT: Where is he a resident?

19 MR. COGDELL: Houston, Texas, and there are two
20 sureties on the bond as well.

21 THE COURT: What is his travel restriction, if any?

22 MR. COGDELL: The State of Texas and court appearances
23 here in New York.

24 THE COURT: Is there a consent to this?

25 MR. CHAN: Yes, your Honor. This was an agreed-upon

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1 bail package which was approved by Judge Moses.

2 THE COURT: OK. Was this approved at the time of the
3 arrest and appearance here in New York in April?

4 MR. CHAN: Yes, it was.

5 THE COURT: Or after indictment during the arraignment
6 proceeding in June?

7 MR. CHAN: Your Honor, this was an agreed-upon bail
8 package from the date of the presentment in the Southern
9 District of New York on April 5.

10 MR. COGDELL: It was approved in the Southern District
11 of Texas initially and then subsequently there was an
12 additional cash requirement of 25,000 that the parties agreed
13 to with the two sureties here in the Southern District of
14 New York.

15 THE COURT: I'll let the government explore with
16 defense counsel whether the bonds need to be re-executed now
17 that the defendant has been indicted.

18 MR. COGDELL: He has not been indicted, actually.

19 THE COURT: An information has been filed?

20 MR. COGDELL: Yes.

21 THE COURT: I'm sorry. Now that an information has
22 been filed against him --

23 MR. COGDELL: Yes, ma'am.

24 THE COURT: -- I think, if I understand the sequence
25 that counsels just have explained to me, the bail terms were

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1 agreed upon when he was subject to a complaint and before the
2 filing of an information. Now his status has changed and there
3 has been a waiver. I take it there was a waiver of indictment?

4 MR. COGDELL: There was.

5 THE COURT: As part of the arraignment?

6 MR. CHAN: Yes, that's correct.

7 MR. COGDELL: Yes.

8 THE COURT: Actually, I'm sorry, excuse me one minute,
9 Counsel.

10 Since that wasn't done before me, I think I am just
11 going to repeat the waiver. I don't have an ROR on that, and I
12 am not sure of the effectiveness when done before a magistrate
13 judge.

14 Thank you. I see you're standing, Mr. Kent.

15 Mr. Kent, have you received a copy of the -- let me
16 make sure I have it before me -- the information that's been
17 filed against you and now bears the number 16 CR 385?

18 THE DEFENDANT: Yes, ma'am.

19 THE COURT: Do you wish me to read it to you?

20 THE DEFENDANT: No, ma'am.

21 THE COURT: How do you plead; guilty or not guilty?

22 THE DEFENDANT: Not guilty.

23 THE COURT: Thank you. You may be seated.

24 I am going to ask you to stand again and we will go
25 through the waiver. This information contains serious charges

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1 against you. You have the right to require the U.S. Attorney
2 to present evidence to a grand jury and see whether or not the
3 grand jury will choose to charge you with these crimes. If it
4 chooses to charge you with these crimes, you would be charged
5 in a different instrument called an indictment, which bears the
6 signature above the grand jury foreperson and also the U.S.
7 Attorney. This is not an indictment, it is an information. It
8 bears the signature solely of the U.S. Attorney.

9 Do you understand what I have just explained to you?

10 THE DEFENDANT: Yes, ma'am.

11 THE COURT: Have you discussed these issues with your
12 lawyers?

13 THE DEFENDANT: Yes, ma'am.

14 THE COURT: Do you willingly give up your right to be
15 indicted by a grand jury with these crimes?

16 THE DEFENDANT: Yes, ma'am.

17 THE COURT: You may be seated.

18 I find a knowing and voluntary waiver.

19 Mr. Cogdell, is there anything else that we need to do
20 from your perspective?

21 MR. COGDELL: No, ma'am. Thank you.

22 THE COURT: Mr. Kent, I have one further thing to do
23 with respect to you. We have a firm trial date here.

24 You may remain seated.

25 That trial date is not going to move. If at any time

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1 you become unable to afford counsel, you have the right, of
2 course, as you have been previously advised, to have counsel
3 appointed to represent you. If at any time you choose to
4 retain other counsel, you certainly have that right as well.
5 But you should make those decisions promptly, because incoming
6 counsel, new counsel, whether appointed or retained, has the
7 right to get fully familiar with this case and prepare for
8 trial. I am not going to move the trial date.

9 Do you understand that?

10 THE DEFENDANT: Yes, ma'am.

11 THE COURT: Thank you, counsel.

12 (Adjourned)